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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/739,857	12/18/2000	James D. Hansa	40002-10083	4208

7590 12/16/2002

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EXAMINER	
PRATT, HELEN F	
ART UNIT	**PAPER NUMBER**
1761	

DATE MAILED: 12/16/2002

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Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No. 09/739,857	Applicant(s) HANSA ET AL.	
	Examiner Helen F. Pratt	Art Unit 1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *22 October 2002* .

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-57* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-57* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

11)☐ The proposed drawing correction filed on _____ is: a)☐ approved b)☐ disapproved by the Examiner.

If approved, corrected drawings are required in reply to this Office action.

12)☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

13)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____ .

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

14)☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).

a) ☐ The translation of the foreign language provisional application has been received.

15)☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____ .
4) ☐ Interview Summary (PTO-413) Paper No(s). _____ .
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: .

DETAILED ACTION

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970);and, *In re Thorington,* 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-16 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 77-93, 98-121 of copending Application No. 739450 and the claims of 09/487,036. Although the conflicting claims are not identical, they are not patentably distinct from each other because of the reasons of record.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Claim Rejections - 35 USC § 112

The following is a quotation of the first paragraph of 35 U.S.C. 112:

> **The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.**

Claim 54 is rejected under 35 U.S.C. 112, first paragraph, as containing subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. No basis is seen in the specification for contacting the food with the ingredients to be absorbed as in claim 54 during a tempering stage.

The following is a quotation of the second paragraph of 35 U.S.C. 112:

> **The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.**

Claim 54 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

No basis is seen in claim 54 for a step of contacting during tempering of the food. The specification mentions on pages 8 and 9, equilibrating the food after it has been contacted with the aqueous solution.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> **(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.**

Claims 1-57 are rejected under 35 U.S.C. 103(a) as being unpatentable over Uchida et al. or Morello et al. in view of Feinstone.

The claims are rejected for the reasons of record cited in the last office action. The claims have been amended to require that the food product consists essentially of particular ingredients. However, nothing has been shown that the ingredients cited in the references materially affect the composition. Even though the particular nutrient of Uchida et al. is not now claimed, Feinstone does disclose coating corn grits with vitamin substances and gums (as before) and that corn grits can be used in place of rice (col. 5, lines 1-5). Therefore, it would have been obvious to make a product with vitamins absorbed onto a food (the oat groat or corn grit), because as in Feinstone, nothing has been shown that the coating of corn grits with vitamins substances and gums does not cause the vitamins to be absorbed onto the food and Morello et al. discloses that it is known to absorb (impregnate with simple sugars, and Uchida discloses treating with an aqueous protein which would also cause the protein solution to be absorbed, as it is also in an aqueous state, and nothing has been shown that this is not the case. It would have been obvious to absorb other materials such as vitamins in an aqueous solution in place of the proteins or simple sugars of the references as nothing has been shown that other ingredients in an aqueous solution would not have also been absorbed.

Claim 50 requires a particular moisture content and claims 51 and 53 that the added materials be fat-free, and is present in a particular amount. Feinstone discloses that the film forming substance can be dried to a water content of less than 15% (col. 2, lines 44-50). Also, the coating of Feinstone do not disclose any fat. Therefore, it would

have been obvious to dry to a particular moisture content and to make the materials to be absorbed fat-free.

Claims 54 and 56 further require that the "contacting" be done during the tempering stage. However, no basis is seen for this step in the specification. Even so, Morello discloses impregnation of sugars during a tempering step (col. 9, lines 58-70). Therefore, it would have been obvious to contact during the tempering stage.

Claims 55 and 57 require that the contacting be done before flaking the food. Morello et al. disclose that flaking is the last step (Fig. 1) which means that the contacting must have been done before the flaking step. Therefore, it would have been obvious to contact the food with an aqueous solution before the flaking step as disclosed by Morello et al.

ARGUMENTS

Applicant's arguments filed 10-22-02 have been fully considered but they are not persuasive. Applicants argue that the double patenting rejection should be withdrawn because the claims of 100-113 contain a drying step, which is lacking in product claims 1-16. However, it is noticed that new claim 50 requires that the product have a moisture content of from 5-10%. Certainly, this indicates that the product has been dried, because the process of making the product in the specification on page 6, 2nd paragraph, indicates a high amount of water (35%) which would have to be removed in order to arrive at a moisture content of from 5-10%.

Applicants argue that the function of the protein coating in Uchida is to prevent elution of oat components when put in hot water and that it serves no nutritional use and

is not one of the presently claimed ingredients. However, this is not seen as protein in itself is a nutritional substance and would be metabolized as such. Various well known types of protein are disclosed which are generally considered to be nutritious such as casein which is a well known milk protein and whey protein which is often added to foods to increase its nutritive value. The reference is now used in "view of" Feinstone which does disclose the use of vitamins and minerals.

Applicants also argue as to Uchida that the coating is to prevent elution of ingredients would not cause absorption of ingredients into the oat. However, nothing has been shown to this effect and the reference is used in view of Feinstone , which does disclose vitamins and minerals. No basis was found for adding the ingredients during the tempering step, and a reference has been shown to show this limitation.

Applicants argue as to Morello that soaking oats in a sugar solution would not allow the oats to absorb the claimed ingredients. Certainly, sugar is a well known ingredient used for energy by the body. The reference discloses in col. 9, lines 59-70 . that simple sugars can be adding during the soaking or tempering steps. No difference is seen at this time between the impregnation of the reference and absorption as ingredients in both cases are drawn into the oats as when dry materials absorb wet materials. Also, claim 6 of the reference discloses the use of "non-native reactants" which would mean ingredients which are not inherently found in the oats.

Applicants argue as to Feinstone that it does not teach absorption of the claimed ingredients. Even if the vitamins and minerals are in the coating containing CMC, which is a film former, the claims do not exclude such. When the coating is wet, nothing

is seen that would keep the vitamins and minerals from being absorbed into the oats. The use of corn grits is disclosed specifically in col. 5, lines 1-2, and other types of cereal such as an oat cereal are disclosed in lines 20-25.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Helen F. Pratt whose telephone number is 703-308-1978. The examiner can normally be reached on Monday, Wednesday and Friday from 9:30 to 6:00 and Tues and Thurs. from 4:30 to 10 p.m.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mr. Milton Cano, can be reached on (703) 3959. The fax phone number for the organization where this application or proceeding is assigned is 703-308-7718.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-1193.

Hp 12-10-02

HELEN PRATT
PRIMARY EXAMINER